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No. 643

In the Supreme Court of the United States

OCTOBER TERM, 1935

UNITED STATES OF AMERICA, PETITIONER

v.

W. V. KNOTT, STATE TREASURER AND EX OFFICIO INSURANCE COMMISSIONER OF THE STATE OF FLORIDA, AND NEW JERSEY FIDELITY AND PLATE GLASS INSURANCE COMPANY

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

The orders of the Leon County Circuit Court (R. 198–201, 235–239, 253–254) denying priority to the claims of the United States are not reported. The opinion of the Supreme Court of the State of Florida (R. 347–356) is reported in 163 So. 64.

JURISDICTION

The judgment of the Supreme Court of Florida was entered June 24, 1935 (R. 357). Petitions for rehearing were denied on September 18, 1935 (R. 362). The petition for a writ of certiorari was filed December 18, 1935, and was granted February 3, 1936. The jurisdiction of this Court rests upon the provisions of Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the Appendix, *infra*, pp. 32–35.

QUESTION PRESENTED

Whether the United States, under Section 3466 of the Revised Statutes, is entitled to priority over Florida creditors in claims to funds deposited with the Treasurer of the State of Florida, as one of the statutory requirements for doing business in Florida, by a New Jersey surety company which thereafter became insolvent and whose assets were transferred for purposes of liquidation.

STATEMENT

The New Jersey Fidelity and Plate Glass Insurance Company, a New Jersey corporation (hereinafter referred to as the Surety Company), became insolvent, and was placed in the hands of the Commissioner of Banking and Insurance of that State for liquidation on May 28, 1932 (R. 11, 20; 300–302). It had theretofore deposited with the Treas-

urer of the State of Florida securities of a face value of $75,000 (R. 1, 8–9) in accordance with Sections 6302–6303 of the Compiled General Laws of Florida, *infra*, pp. 32–33.

On December 19, 1932, William H. Kelly, Commissioner of Banking and Insurance of the State of New Jersey, filed a bill of complaint in the Circuit Court of Leon County, Florida, to prevent the Treasurer of the State of Florida from paying out these securities to any person without an order of the court (R. 1–3). As amended, the bill requested that certain listed claims (including seven judgment claims of the United States) be excepted from the requested injunction and restraining order (R. 4–6). A temporary restraining order [1] was issued preventing the payment, without an order of court, of any claims by the State Treasurer, with the exception of the listed claims (R. 6–8).

Between September 15, 1932, and April 18, 1933, the United States obtained twenty judgments totaling $14,075 in the United States District Court for the Southern District of Florida based upon estreated bail bonds executed in that court (R. 157–166; 292–297). In the case of all but five of these judgments the bonds became estreated prior to May 18, 1932, the date of the insolvency of the Surety Company and all of the judgments had been entered

[1] Except when otherwise stated, all orders referred to in the statement of the case were entered by the Circuit Court of Leon County, Florida, and all court proceedings referred to were in that court.

prior to the appointment of the receiver in this cause (Ibid.). Notice of all but one of these judgments was filed with the State Treasurer, pursuant to Section 6303 of the Compiled General Laws, prior to the May 10, 1933, amendment thereof (Ibid.).

By the Act of May 10, 1933 (C. 16248, Acts 1933), *infra*, p. 34, Section 6303, Compiled General Laws, was amended to provide that the chancery court should, upon a bill filed by any party in interest, take charge of the securities deposited by any insolvent surety company and distribute the proceeds thereof among Florida creditors who prove their claims. On May 16, 1933, The London Operating Company, a Florida corporation, instituted suit for the relief provided by this Act (R. 9–12). On May 17, 1933, an order was filed appointing a receiver to take charge of the assets of the Surety Company in Florida, and restraining all actions against it until further order of the court (R. 14–16). On May 25, 1933, the receivership proceeding was consolidated with the suit instituted by the New Jersey Commissioner (R. 18–19).

On June 16, 1933, a rule was issued against the State Treasurer requiring him to show cause why he should not turn over to the receiver, in addition to bonds of the Surety Company already delivered, $20,000 worth of bonds alleged to be held by him to pay judgments and claims filed with him (R. 27–30). On October 30, 1933, the United States District Court for the Southern District of Florida

dissolved an order theretofore issued by it directing the Treasurer to hold certain bonds until further order (R. 163–164). The dissolution was predicated upon principles of comity and power of this court to review decisions of state courts (R. 164). On January 1, 1934, the Treasurer was ordered to turn over to the receiver the remaining securities of the Surety Company (R. 185). The receiver holds no assets other than the proceeds (including interest payments) of the deposited securities (R. 185, 187; 250–251).

On May 27, 1934, the United States filed its claims, based upon the twenty judgments described above, asserting preference by reason of R. S., Section 3466 (R. 157–166; 292–302). An order of May 28, 1934, denied the receiver's motion (R. 185–192) to dismiss these claims but also denied the motion of the United States (R. 195–197) to strike certain portions of the receiver's answer to its claims (R. 198–201). The court ruled in this order that though the claims of the United States were valid claims within the intendment of R. S., Section 3466, they were subordinate to the claims of residents of Florida holding obligations arising out of surety bonds or contracts (Ibid.). Pursuant to this order the receiver in his report of June 14, 1934, subordinated the claims of the United States to those of Florida creditors holding surety obligations (R. 201–211). Following hearings on exceptions to this report, the court on August 7, 1934, allowed various preferred and general claims against the

deposited securities, expressly ruling that the claims of the United States were not payable out of the deposit and reserving decision as to whether or not they were payable out of any surplus that might remain (R. 235–239).

On October 4, 1934, the receiver filed a report in the nature of an accounting and requested the court to adjudicate undisposed of claims, direct payment of claims allowed and of the expenses of the receivership, and determine whether any surplus should be remitted to the New Jersey Commissioner or first subjected to the claims of the United States (R. 246–251). This report showed that the receiver held bonds of a face value and cash derived from bonds in the total amount of $71,968.27, against which there were claims theretofore allowed and estimated receivership expenses of $33,476.28 and undisposed of claims of $35,149.92 (Ibid.). In addition the report described appeals pending in the Supreme Court of Florida for claims theretofore disallowed, which totaled $3,500 (Ibid.).

The New Jersey Commissioner on October 20, 1934, repeated his assertion of July 23, 1934 (R. 218–219) that any surplus remaining after payment of the claims of residents of Florida should be turned over to him (R. 251).

An order of October 20, 1934, directed sale of the bonds (R. 252), and on October 27, 1934, the receiver's report of October 4, 1934, was approved and payment of allowed claims totaling $28,476.28 was directed (R. 253–254). The right of the United

States to receive payment out of the residue, the New Jersey Commissioner's claim to the residue, and various other claims were to receive further consideration (Ibid.).

From this order the New Jersey Commissioner appealed to the Supreme Court of Florida (R. 349; 279–281), and the United States filed cross-assignments of error (R. 356; 303–304). The order was affirmed on June 24, 1935, by the Supreme Court of Florida (R. 347–357).[2] The denial of the claim of the United States to priority was based upon the Supreme Court of Florida's determination that Sections 6302 and 6303 of the Compiled General Laws at the time of the deposit in question, and hence long prior to the amendatory Act of May 10, 1933, created a fund in the nature of a trust fund for Florida creditors and were not designed to create any special protection for the United States (R. 352–356). The petition of the United States for rehearing (R. 358–359) was denied by the Supreme Court of Florida on September 18, 1935 (R. 362).

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[2] The concluding paragraph of the opinion of the Supreme Court of Florida (R. 356) and the judgment entered by that court (R. 357) affirmed the decision below as "modified to conform" to the opinion rendered. The opinion expressly denied the right of the United States to *participate* in the funds derived from the deposited securities (R. 355-356). As stated *infra*, pp. 11–13, the United States, for these and other reasons, believes that not only was the claim for priority denied but that all right to payment out of the deposited securities in the Florida courts was also denied.

SPECIFICATION OF ERRORS

The petitioner urges that the Supreme Court of Florida erred:

1. In denying the United States priority in the fund in question under Section 3466 of the Revised Statutes.

2. In denying the United States the right of participation in the fund on the ground that Congress has prescribed special legislation for its own protection in the case of defaulted surety company bonds by United States Code, Title 6, Secs. 1–11.

3. In affirming (as modified) the decision of the Circuit Court of Leon County. . .

SUMMARY OF ARGUMENT

I

The judgment of the Supreme Court of Florida was a final order within the principles governing the review by this Court of the decisions of courts of the States. In denying the claims of the United States to priority under Section 3466, Revised Statutes, the Supreme Court of Florida not only affirmed an order for the distribution of a part of the fund in question among claimants adverse to the United States, but denied the United States any right to participate in any part of the fund while in the hands of the Florida receiver.

Thus the decision below leaves nothing more to be decided with respect to the United States. Furthermore, that part of the decision which affirmed the order of distribution, considered alone,

was final inasmuch as its execution would irretrievably dispose of claims of the United States to these funds.

The decision of the Supreme Court of Florida is adverse to the rights of the United States since it remits the United States to its remedy in the domiciliary proceedings where it seems improbable that the United States will receive payment in full; and that part of the decision which ordered a partial distribution is also adverse to the United States in that it does not appear certain that the residue of the funds will be sufficient to satisfy the claims of the United States in full.

II

The Florida statutes relating to the distribution of the deposited securities here involved did not confer upon Florida claimants such interests as will supersede the rights of the United States, under Section 3466, Revised Statutes, to priority of payment. The surety company was insolvent within the intendment of the statute, and all its property had been transferred to others to be applied in payment of its indebtedness. The effect of the decision of the Florida court is to construe the priority of the United States as applying only to assets remitted to the domiciliary liquidator. This would permit, contrary to established principles, the States to defeat the priority of the Federal Government, since a State may properly permit the application of assets within its jurisdiction to the satis-

faction of local claims prior to any remission of such assets to the domiciliary liquidator.

Even if the deposited securities had been subject to perfected specific liens superior to the claims of the United States, the latter would be entitled to priority in payment of its claims out of the remaining assets. Such remaining assets fall within the plain terms of the statute. The priority here asserted is in no way in conflict with cases holding administration expenses superior to claims of the United States.

ARGUMENT

I

THE JUDGMENT OF THE SUPREME COURT OF FLORIDA CONSTITUTED A FINAL JUDGMENT AND WAS PREJUDICIAL TO THE RIGHTS OF THE UNITED STATES

1. THE JUDGMENT BELOW WAS FINAL

The receiver, hereinafter referred to as respondent, contends (Br. in Opp. 8–9) that the order of October 27, 1934, which was appealed to the Supreme Court of Florida, was not a final order, and that the order of May 28, 1934, which denied the United States priority over local claimants, constituted the final order in the case which determined and disposed of the rights which the United States is here asserting. This contention, we believe, is not now available to respondent, and is not relevant to the issues here raised.

The respondent does not contend that because all claims have not yet been disposed of no judgment in this case can be regarded as final within the meaning of the principles applicable to review by this Court. Indeed, as stated above, the respondent contends that the order of May 28, 1934, was final, and apparently urges either that the United States has waived its right to appeal or that the United States appealed to the Supreme Court of Florida from the wrong order. These are obviously matters of Florida law, to which the rules affecting the jurisdiction of this Court are not applicable, and have, in effect, been decided adversely to respondent by the very decision here involved.[3] Lastly, the finality of orders of the Circuit Court of Leon County is not relevant to the issues before this Court—the judgment under review is a judgment of the Supreme Court of Florida, not an order of the Circuit Court.

We submit that for the purpose of review by this Court, the finality of the judgment of the Supreme Court of Florida is not open to serious question. The Supreme Court of Florida has affirmed an

[3] It may further be noted that respondent's contentions, which so far as appears from the record were not raised in an appropriate manner in the proceedings below, are apparently without merit under Florida law. Not only may appeals be postponed "until the end of the cause" involved (Comp. Gen. Laws, 1927, sec. 4961), but it is the order of sale and distribution which is considered final, not a prior decree which fixes the rights of the parties. *Banks* v. *Guinyard*, 63 Fla. 334.

order for the distribution of the fund in question to the extent needed to satisfy the allowed claims of various Florida creditors, and, we contend, has further ruled that the United States is not entitled to participate in the fund even after satisfaction of Florida claimants.

The Supreme Court of Florida stated (R. 355–356) that "the United States asserts *not only a right of participation* in the security fund * * *, but insists upon a priority of payment of its claim out of such fund * * *." (Italics added.) The court expressly denied "the claim of the United States on the first proposition" (R. 356), and in so doing relied upon its construction of the Florida statutes as not "conferring statutory benefits with reference to surety bonds executed in Florida running to the United States" (Ibid.). No specific discussion appears in the opinion as to the second proposition, namely, that of the priority of the United States. From this it is apparent that the court considered that so far as the United States was concerned there was no local policy requiring the treatment of these funds as other than general assets to be "turned over to the domiciliary liquidator * * *, after the satisfaction thereout of Florida claims," and that Section 3466, Revised Statutes, applies only to general assets in the hands of the domiciliary liquidator. We submit that accordingly the decision must be regarded as remitting the

United States to its right to submit the claims in the New Jersey liquidation proceedings.[4]

This denial of any right to participation in the funds held by the Florida receiver constituted a final judgment. *Ex parte Tiffany,* 252 U. S. 32, 36; *Gumbel* v. *Pitkin,* 113 U. S. 545, 548; *Savannah* v. *Jessup,* 106 U. S. 563, 564–565; *United States* v. *River Rouge Improvement Co.,* 269 U. S. 411, 413–414. The claim of the United States "has been finally disposed of, and no longer is a pending proceeding." *Clark* v. *Williard,* 292 U. S. 112, 118–119.

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[4] This is further borne out by the express *modification*, in both the opinion and the judgment here under review, of the decree of the Circuit Court "to conform to the holding" of the opinion (R. 356–357). The sole appellants in this proceeding were the United States and the domiciliary liquidator. The domiciliary liquidator objected to the allowance of claims other than those of judgment creditors and claimed the right to any residue as general assets (R. 279–281). Modification of that part of the order of the Circuit Court which disallowed claims of those non-judgment creditors whose claims did not arise out of surety bonds was not urged by either appellant, and was accomplished in express terms in a separate opinion and judgment entered upon a totally distinct appeal by a non-surety bond creditor (R. 370–371). The affirmance of the allowance of the claims of non-judgment creditors whose claims did arise out of surety bonds required no modification. The only meaning which can reasonably be ascribed to the modification required by the judgment here involved is that it related to the reserving of decision by the Circuit Court as to the disposition of any surplus and was adverse to the United States.

And even if this Court considers that the Supreme Court of Florida did not modify the Circuit Court's ruling reserving consideration of the rights of the United States in the residue, that part of the judgment which denied priority to the United States as against the Florida creditors whose claims had been allowed, and which directed distribution to such creditors, is in itself final for purposes of review. If review of this decision of the Supreme Court of Florida could not be had by the United States, its claim to priority in the sums disbursed would be irretrievably lost as a practical matter and the issue would become moot as a matter of law. Such practical finality as to specific property and as to specific issues has been expressly held to constitute finality within the rule here considered, even where additional property and independent additional issues are undisposed of as between the very parties affected by the judgment. *Carondelet Canal Company* v. *Louisiana,* 233 U. S. 362. In the instant case, no such remaining issues exist. The ruling of the Circuit Court reserving decision as to whether the United States should be entitled to payment out of such residue as might remain after payment of the Florida creditors presents at most issues affecting the United States which are alternative to and in substitution of the issue here raised. If review is not now granted no decision upon those issues will be made until after possibility of review of the United States' claim to priority

as against Florida creditors has ceased; indeed, no ruling on that matter is possible except as a consequence of a decision adverse to the United States on the question of priority. Neither in form nor in effect does the judgment of the Supreme Court of Florida require further proceedings on this issue, as did the judgments considered in *Bostwick* v. *Brinkerhoff*, 106 U. S. 3; *Haseltine* v. *Central Bank*, 183 U. S. 130; *Louisiana Navigation Co.* v. *Oyster Commission*, 226 U. S. 99, and similar cases. If this Court should affirm the decision, "the court below would have nothing to do but to execute the judgment * * * already rendered." *Bostwick* v. *Brinkerhoff*, *supra*, at pp. 3–4; *Georgia Ry. Co.* v. *Decatur*, 262 U. S. 432, 437.[5]

[5] Statements to the effect that "this court may not be called upon to review by piecemeal the action of a state court" (*Louisiana Nav. Co.* v. *Oyster Comm.* 226 U. S. 99, 101), or that "to be reviewable a judgment or decree must be not only final, but complete, that is, final not only as to all the parties, but as to the whole subject matter and as to all the causes of action involved" (*Arnold* v. *Guimarin & Co.*, 263 U. S. 427, 434), are not inconsistent with the above decisions as applied to the present case. See *Carondelet Canal Co.* v. *Louisiana*, 233 U. S. 362, 372–373. The statement in the *Louisiana Nav. Co.* case, made with reference to an order which on its face was not final, was not based upon a construction of the statutory authority of this Court. Furthermore, the opinion stresses the fact that in that case the right of review would not be lost by the dismissal (pp. 101–102). Similarly the basis of the decision in the *Arnold* case is that no action had been taken below which irretrievably fixed the amounts due any claimant (pp. 432–433).

2. THE JUDGMENT WAS PREJUDICIAL TO THE RIGHTS OF THE UNITED STATES

The respondent also contends (Br. in Opp. 10) that the United States was not adversely affected by the order of October 27, 1934, from which it appealed. Here again respondent seeks to raise in this court questions of state law already decided adversely to him by the decision of the Supreme Court of Florida in this case. Nor is there merit in the contention that the judgment of the Supreme Court of Florida was not adverse to the United States.

If, as we contend, the United States has been denied participation in any funds resulting from the sale of the deposited securities, it appears from the record that it is improbable that the United States will receive payment in full in the New Jersey liquidation proceedings (R. 298, 309, 310, 316). Clearly it can not be said that the ruling below could not have prejudiced the rights of the United States. Cf. *Boston and Albany Railroad Co.* v. *O'Reilly,* 158 U. S. 334, 337; *Vicksburg & Meridian Railroad* v. *O'Brien,* 119 U. S. 99, 103.

Similarly, even if this Court should determine that the judgment here challenged did not pass upon the right of the United States to payment from the fund out of any residue that may remain after satisfaction of the Florida creditors, that part of the judgment which affirmed the order of distribution to pay allowed Florida claims was preju-

dicial to the rights of the United States. The right of the United States to payment out of general assets found in a State not the domicile of the insolvent, where the public policy of such State provides for delivery of such assets to the domiciliary liquidator, has, so far as we are aware, never been passed upon by this Court. Assuming the correctness of the principle announced by various of the inferior Federal courts[6] that claims of the United States do not precede expenses of administration, it may well be that the United States has no right to satisfaction out of such general assets prior to receipt thereof by the domiciliary liquidator. Consequently, the right of the United States to satisfaction out of the residue of the proceeds of the deposited securities may turn upon the doubtful question of whether or not such residue is to be regarded as general assets. Erroneous remission to litigation, the outcome of which is unpredictable, is not harmless error. Cf. *Ashwander* v. *Tennessee Valley Authority,* Nos. 403 and 404 of the present term.

Furthermore, despite the ruling of the Circuit Court to the effect that sufficient funds to pay in

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[6] *Kennebec Box Co., Inc.*, v. *O. S. Richards Corp.*, 5 F. (2d) 951 (C. C. A., 2d); *In re Holmes Mfg. Co.*, 19 F. (2d) 239, 241–242 (D. Conn.); *Piedmont Corp.* v. *Gainesville & N. W. R. Co.*, 30 F. (2d) 525, 528–529 (N. D. Ga.), and see *Wire Wheel Corp.* v. *Fayette Bank & Trust Co.*, 30 F. (2d) 318, 320 (C. C. A., 7th), certiorari denied, 279 U. S. 873, in which the point was decided without discussion. Cf. *In re Jacobson*, 263 F. 883, 885 (C. C. A. 7th).

full the claims of the United States would remain after payment of all Florida creditors,[7] it can not be said that even if the right of the United States to the residue be assumed the record discloses "beyond doubt, that the error complained of did not and could not have prejudiced the rights" of the United States. Cf. *Vicksburg & Meridian Railroad* v. *O'Brien, supra,* at p. 103.

The accounting contained in the receiver's report of October 4, 1934, to which respondent refers (Br. in Opp. 10), discloses assets of $71,968.27, of which $1,193.92 represented general assets of the Surety Company[8] and of which $71,000 represented the par value of the securities (less allocable expenses already incurred and chargeable to the securities) (R. 251). The order affirmed by the Supreme Court of Florida directed the distribution, out of the proceeds of the securities, of claims totaling $28,476.28 (R. 253), plus expenses of the receivership previously allowed (R. 254). These expenses are not set forth in the order, but the report which it approved *estimated* receivership expenses at $3,000 (R. 247). This report further disclosed pending undisposed of

[7] R. 254, as amended by stipulation filed in this Court.

[8] This sum represents interest on the securities received by the State Treasurer prior to the appointment of the Florida receiver (R. 246, 250) and is not here involved since the United States has made no claim to any general assets within the State of Florida.

claims, exclusive of those of the United States, totaling $21,074.92, and additional disallowed claims pending on appeal totaling $3,500 (R. 248). All of the undisposed of and appealed claims are of such a nature that if the judgment below be sustained, they would, if proved, be legally entitled to take precedence over the claims of the United States. Indeed, the record discloses that at least one of these claims has been so preferred since the order of the Circuit Court.[9]

After deduction of the various amounts listed above, the receiver's accounts as of October 4, 1934, show an *estimated* $14,723.75 residue. The claims of the United States total $14,075 (R. 237–8; 248). The estimated surplus is based upon two assumptions: (1) valuing the securities at par (R. 251); and (2) limiting the total expenses of the receivership, from October 4, 1934, until the final disposition of the funds involved, to an estimated $3,000 (R. 247). The record does not disclose whether the securities have actually been converted into cash, although an order of sale at a price in excess

[9] The receiver's report (R. 248) listed claims of Snedigar & Baya as undisposed of and the order of October 27, 1934, expressly confirmed this (R. 254). The separate appeal of these claimants resulted in a modification of the order so as to allow these claims on the authority of the opinion here involved (R. 370–371). This ruling would also remove the only legal reasons upon which other undisposed of claims had been denied preferential status equal to that of the claims of other Florida creditors (R. 206–207; 208).

of par was entered (R. 252). The mere fact of the extension of the receivership proceedings to this date warrants the inference that the final expenses may well exceed the modest estimate of $3,000. Thus the record fails to establish that the decision of the Florida Supreme Court does not adversely affect the United States.[10]

II

By Virtue of Section 3466 of the Revised Statutes, the United States Was Entitled to Priority in Payment of Its Claims Over All Creditors, Domestic or Otherwise, Out of the Securities Deposited With the State Treasurer of Florida.

Section 3466 of the Revised Statutes, *infra*, p. 32, as construed by this Court, establishes that when any person indebted to the United States is insolvent and when the possession and control of such person's estate has been given to any other person charged with the duty of applying it to the payment of the debts of the insolvent, the indebtedness due the United States is required first to be satisfied. *Bramwell* v. *United States Fidelity & Guaranty Co.*, 269 U. S. 483, 490.

There can be no doubt of the applicability of the statute to the debts here due the United States.

[10] This conclusion is not affected by the fact that the United States has also filed its claims in New Jersey with the domiciliary liquidator (R. 298). The amount, if any, which the United States might recover there if its claims should not be satisfied in full in the Florida receivership, is plainly conjectural so far as the record discloses (R. 298, 309; 310, 316).

See *Bramwell* v. *U. S. Fidelity & Guaranty Co., supra,* pp. 487–488; *Price* v. *United States,* 269 U. S. 492, 499–500. Cf. *Pierce* v. *United States,* 255 U. S. 398, 401–402. In *Beaston* v. *Farmers' Bank,* 12 Pet. 102, 134, this Court, referring to the provision from which the present statute was derived, established the generality of the indebtedness covered:

> All debtors to the United States, whatever their character, and by whatever mode bound, may be fairly included within the language used * * *. It, therefore, lies upon those who claim exemption from the operation of the statute, to show that they are not within its provisions. * * * As this statute has reference to the public good, it ought to be liberally construed. * * *

As this Court has more recently said, "There exists [sic] now the same reasons for a liberal construction of the priority act as when the rule was laid down." *Bramwell* v. *U. S. Fidelity & Guaranty Co., supra,* p. 487. The purpose of the statute "is not to be defeated by unnecessarily restricting the application of the word 'debts' within a narrow or technical meaning." *Price* v. *United States, supra,* p. 500.[11] See also *United States* v. *Fisher,* 2 Cranch. 358, 386, 395.

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[11] The record discloses that five of the twenty judgments upon which the claims of the United States are based, were entered on bail bonds which were estreated after May 28, 1932, the date of the general assignment of the Surety Com-

The Surety Company was plainly insolvent within the intendment of the statute, namely, it did not have sufficient property to pay all its debts (*United States* v. *Oklahoma*, 261 U. S. 253, 260) and it had manifested its insolvency by voluntarily turning all of its property over to the Superintendent of Banking and Insurance for the state of its domicile for the purpose of having him apply its assets to the payment of its indebtedness (R. 11, 20, 300–302, 308–310, 345–347). *Bramwell* v. *United States Fidelity & Guaranty Co.*, *supra*, pp. 488–490; *Price* v. *United States*, 269 U. S. 492, 502; *United States* v. *Butterworth-Judson Corporation*, 269 U. S. 504, 513–514.

The respondent contends (Br. in Opp. 13) that it does not appear that all of the assets of the Surety Company were in the hands of the Florida receiver. Since an ancillary receiver holds only the assets within the state of his appointment, respond-

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pany. (Claims 15, 17, 18, 19, and 32. R. 293–294 and 297.) Whether the condition of these bonds had been violated at this time does not appear. Since the rights of Florida creditors were not enlarged at any time prior to the appointment of the Florida receiver (*infra*, pp. 25–27), and since by that date all of the United States' claims had been reduced to judgment (R. 157, 293–297), the exact date of the accrual of the claims of the United States is not here material. It may be noted further that during the course of the proceedings the Circuit Judge ruled specifically that the Government's claims were within the priority statute (R. 200).

ent's contention, so far as relevant to the issues here presented, in effect is that the statute does not apply—except in the theoretically possible case of a corporation having all of its assets in a foreign jurisdiction—to ancillary proceedings. We submit that respondent's construction is unsound.

Section 3466 of the Revised Statutes must be read in connection with its companion statute, Section 3467, *infra*, p. 32. Cf. *Bramwell* v. *U. S. Fidelity & Guaranty Co.*, 269 U. S. 483, 490. The latter provision makes any "person, who pays * * * any debt due by the person or estate from whom or for which he acts before he satisfies and pays the debt due to the United States from such person or estate", personally answerable to the United States. Unquestionably the Florida receiver acts for an estate of a debtor of the United States. That debtor's assets are insufficient to pay all its debts, and its insolvency has been manifested by the transfer of possession and control of all its assets to two or more persons charged with the duty of applying, pursuant to applicable law, the particular assets held by them, respectively, to the payment of the debtor's obligations. To construe the priority of the United States as not applying in such a case until after the remission of assets to the domiciliary liquidator would, contrary to long established principles (see *Field* v. *United States*, 9 Pet. 182, 201), result in permitting the States to defeat the priority of the Federal Government and make the statute

patently defective to accomplish the purpose contemplated. Such a construction would permit a State in which were located the chief assets of a Delaware corporation (such was the situation in *Equitable Trust Co.* v. *Connecticut Brass & Mfg. Co.*, 290 F. 712 (C. C. A. 2d)) to prefer its local creditors under the power recognized in *Clark* v. *Williard*, 294 U. S. 211, in derogation of the priority of the United States.[12]

Thus the sole issue presented is whether the particular property of the debtor here involved—the deposited securities or their proceeds—is exempted from the rule of preference created in general

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[12] We are not aware of any decision of the Federal courts upon this question. The cases cited by respondent (Br. in Opp. 13) merely state the established doctrine that unless all of the assets of the debtor have been transferred at least one of the necessary indicia of insolvency is lacking. *United States* v. *Hooe*, 3 Cranch 73, 91. The case of *Equitable Trust Co. of New York* v. *Conn. Brass & Mfg. Corp.*, 290 Fed. 712 (C. C. A. (2d)), referred to by respondent, involved claims presented by the United States by intervention in an ancillary receivership. The decision, however, was rested upon the fact that the receiver was appointed to conduct the debtor's business and not to liquidate its assets in order to pay its debts (pp. 714, 715). Cf. *United States* v. *Oklahoma*, 261 U. S. 253. There was consequently no need to pass upon the question of whether in a case otherwise within the statute the United States might under the statute claim priority in the ancillary proceedings. The court indicated, however, that if there had been such a transfer of the debtor's assets as to be within the statute, the United States would have been so entitled—"the government might have appeared before a master on reference and proved its claim * * *" (p. 715).

terms by the statute. We submit that the decisions of this Court establish that no such exemption is applicable.

The Government does not here question the power of the State of Florida, as against the domiciliary liquidator, to subject the securities to seizure and sale under the process of its courts and to distribution among local creditors.[13] *Clark* v. *Williard,* 294 U. S. 211, 213–215. For the purposes of the instant case this power is specifically established by the denial of the domiciliary liquidator's petitions for certiorari in two cases arising out of the proceedings here involved. *Withers* v. *Knott,* No. 644 of the present term, and *Withers* v. *Snedigar,* No. 645 of the present term, certiorari denied February 3, 1936. The Government contends simply that its statutory right of priority is not defeated by this exercise by the State of Florida of its sovereign powers.

It is not material in this case to determine whether the priority of the United States with respect to the deposited securities attached upon the

[13]As in the case of *Clark* v. *Williard*, 294 U. S. 211, 216, no point was made below as to the situs of the securities involved. Furthermore, it would appear that under the construction of the Florida statutes adopted by the Supreme Court of Florida, the Surety Company in depositing the securities had voluntarily placed them within the jurisdiction of the Florida courts. The record discloses proper service of process upon the Surety Company (R. 20) and the domiciliary liquidator was a party to the proceedings below (R. 1–3, 18–19). See *Clark* v. *Williard*, 292 U. S. 112, 119–20.

taking over of the Surety Company by the New Jersey liquidator or upon the appointment of the Florida receiver, since under Florida law, as appears hereafter, no changes occurred in the rights of Florida creditors between those dates. For the purposes of this argument it is assumed that the priority arose at least as early as the appointment of the Florida receiver and that the extent of the preference of the United States is to be determined by the rights existing on that date. See *United States* v. *Oklahoma,* 261 U. S. 253, 260. Nothing Florida might do thereafter could impair or supersede that priority (Ibid.).

Up to that time the deposited securities had clearly remained the property of the Surety Company or its successor. The Florida statutes speak of the depositing company as the "owner" of the securities and specifically provide that the depositing company shall be entitled to collect interest on the securities while they remain on deposit (Sec. 6302, *infra,* p. 32). These securities, according to the decision of the Supreme Court of Florida, were subject to attachment in favor of judgment creditors until insolvency and upon insolvency were to be distributed, in a special chancery proceeding, among all Florida claimants (Opin., R. 348 at 354–355).

We submit that upon the insolvency of the Surety Company and the assumption of control of the deposited securities by the Florida receiver, no rights had been created in favor of any Florida creditor that would defeat the priority given to the

United States by Section 3466, Revised Statutes. At that time the Florida claimants entitled to satisfaction out of the fund were unascertained. Their ascertainment depended upon the filing of a bill by some "party in interest" requesting the aid of a chancery court, upon the consequent ascertainment, "as far as practicable, [of] the names and addresses of all Florida creditors and the amounts due and owing to them under bonds given by said surety company", upon the proof of such claims, and upon a distribution of the fund "proportionately" among such claimants by the court.

In *Spokane* v. *United States,* 279 U. S. 80, this Court held that debts due the United States took precedence over personal property taxes assessed prior to the application of Federal priority (p. 93) and collectible out of the taxed property or, if that property had been disposed of, as a lien upon all the real and personal property of the taxpayer by seizure, distraint, or other specific proceedings (pp. 93–94). The priority was sustained because no distraint or similar proceeding had been begun at the time the priority arose and hence the liens "were not specific" (p. 94).

In the instant case no Florida creditor had even such an interest in the deposited securities as might thereafter ripen into a specific lien upon specific property. The priority of the United States appears to follow *a fortiori* from the *Spokane County* decision.

Other decisions fortify this conclusion. In *New York* v. *Maclay*, 288 U. S. 290, claims of the United States were held to take precedence over unliquidated taxes due the State of New York, although payment of the taxes was under New York law secured by a lien which bound the taxpayer's property even in the hands of *bona fide* purchasers or encumbrancers who took before assessment (p. 292). This Court said:

> To hold that a lien has progressed to such a point as to be a warning to mortgagees and purchasers of a contingent liability, like a notice of *lis pendens*, is far from holding that while the liability is unliquidated and unknown the lien thus created is perfect and specific. By the terms of the hypothesis it is nothing of the kind. If the state were to stand upon the warning and omit to ascertain the debt, it would never be able to sell anything, for it would not know how much to sell. Against mortgagees and purchasers a lien perfected afterwards may take effect by relation as of the date of the inchoate lien through which mortgagees and purchasers become chargeable with notice. The doctrine of relation will not divest the United States of the preference that accrued when receivers were appointed * * * (p. 293).
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> * * * the statutory preference must prevail against the lien of a tax not presently enforcible, but serving merely as a *caveat* of a more perfect lien to come (p. 294).

In the instant case there had been no final liquidation of the amounts of the respective claims of Florida creditors, for all creditors, whether holders of judgments or general claimants, had to prove their claims prior to participation. In addition the Florida creditors had no interests in any particular property, much less interests which like those of the State of New York in the *Maclay* case would bind the property in the hands of third persons. . It seems plain that their claims cannot supersede those of the United States. Compare also *Thelusson* v. *Smith,* 2 Wheat. 396, 425–426, discussed in *New York* v. *Maclay, supra,* pp. 293–294, in which priority was sustained against the lien of a judgment under which execution had not issued when the priority attached.

In short, Florida creditors had no specific or perfected interests in the deposited securities and their rights were liens, if at all, only in the broad sense of preferred claims. Cf. *Marshall* v. *New York,* 254 U. S. 380, 386. The laws of Florida simply set up a method for the administration or distribution of these particular assets, with specified preference in favor of designated classes of local creditors. It is submitted that these preferences do not take precedence over the claims of the Federal Government, for, as demonstrated above, Florida may not "create a priority in favor of other creditors, in cases of insolvency, which should supersede that of the United States." See *Field* v. *United States,* 9 Pet. 182, 201. Cf. *United States* v. *Fisher,* 2 Cranch. 358, 396–397.

Finally, the Government contends that if the deposited securities had been subjected to perfected specific liens, sufficiently similar to a divestment of the ownership of the Surety Company to prevail against the priority statute (see *New York* v. *Maclay*, 288 U. S. 290, 293–294), the United States would be entitled to payment of its claims out of so much of the proceeds as might remain after satisfaction of such liens. Section 3466, Revised Statutes, read with Section 3467, requires the Florida receiver to pay first the claims of the United States out of any assets of the surety company in his hands available for distribution. The residue falls within the plain terms of the statute. This, we submit, follows whether the interest of the surety company be merely equitable or be the full legal title subject to the liens, since such interest would in any event constitute assets of the debtor.

The Government's position is not opposed to those decisions in the lower Federal courts (*supra*, p. 17, note) which subordinate claims of the United States to expenses incurred by the receiver or assignee on the ground that only the net assets are available for distribution to any creditors. No claim is made to payment ahead of the expenses of the Florida receivership. The domiciliary liquidator can not bring himself within the doctrine of the cases on administrative expenses except to the extent that he claims to have taken specific steps to

aid the Florida receiver in conserving these assets. As to such expenses his claim is addressed to the discretion of the Florida chancery court and if allowed should be treated as an expense incurred in the ancillary proceedings. But his general claim to any assets remaining can rest on no services performed in conserving assets to be available for satisfaction of claims of the United States.

CONCLUSION

We respectfully submit that the judgment of the court below should be reversed and the case remanded with instructions that a judgment be entered in favor of the priority of the United States over all other claims.

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MARCH 1936.

APPENDIX

Sections 3466 and 3467 of the Revised Statutes of the United States (U. S. C., Title 31, Secs. 191, 192) provide:

> SEC. 3466. Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.
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> SEC. 3467. Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid.

Section 6302, Compiled General Laws of Florida:

> *Requirements to do business in this State.*—Companies herein described, char-

tered by this State, or other States or foreign Governments, now doing business in this State, or hereafter doing business in this State, which offer or undertake to become surety upon any bond, or surety contract, before being accepted as surety thereon, shall be required to deposit with the Treasurer of this State bonds of the United States, or bonds of any State of the United States, and which amount according to their market value, to seventy-five thousand dollars which bonds shall be receipted for by the State Treasurer and held or deposited by him. And whenever such company ceases to do business in this State, and has settled up all claims against it, as hereinafter provided, and has been released from all the bonds upon which they have been taken as sureties said bonds shall be delivered up to the proper party on presentation of the Treasurer's receipt for said bonds. While said bonds are so deposited with the Treasurer, the owner of the same shall be entitled to collect the interest on the same. For the bonds so deposited, the faith of the State is pledged that they shall be returned to the party or parties entitled to receive the same.

Section 6303, Compiled General Laws of Florida:

"*Final judgment against surety company.*—Whenever final judgment has been rendered against any surety company on a fidelity or surety bond, said surety shall pay the same within thirty days. Upon notice of failure to pay said amount within said time, the State Treasurer shall retain said bonds, or so much thereof as may be necessary to cover said judgment and costs, subject to the order of the court trying any suit that may be brought upon such bond.

Chapter 16248, Laws of Florida, 1933:

SECTION 1. That Section 4340 of the Revised General Statutes of Florida of 1920, the same being Section 6303 of the Compiled General Laws of Florida 1927, be and the same is hereby amended to read as follows:

"6303 (4340) FINAL JUDGMENT AGAINST SURETY COMPANY.

"Whenever a final judgment has been rendered against any surety company on a fidelity, appearance, supersedeas or surety bond, the surety on said bond shall pay the same within thirty days. Upon notice of failure to pay the amount due under said bond within said time, the State Treasurer shall retain the bonds or securities deposited with him by said surety company under Section 4339 of the Revised General Statutes of Florida of 1920, and acts amendatory thereof, or as much thereof as may be necessary to cover said judgment and costs, subject to the order of the Court trying any suit that may be brought upon said bond: Provided, however, that in the event of the adjudication of insolvency of any such surety company by a court of competent jurisdiction, or in the event its assets should be placed in liquidation in the State of its incorporation, the Court of Chancery, at the seat of Government in Florida shall have jurisdiction, upon bill filed by any party in interest, to take charge of the securities so deposited with the State Treasurer under the provisions of Section 4339 of the Revised General Statutes of Florida of 1920, and acts amendatory thereof, together with any other assets of such surety company, which may be marshaled in the State of Florida, to direct a sale of the said securities at public or private sale and on such terms as the said court deems proper and, after paying all

costs and expenses, including reasonable counsel fees incurred in connection with said proceedings, all as allowed by the court, to distribute the proceeds of the sale of said securities proportionally among all of the Florida creditors who may make proof of their claims against any such surety company to the satisfaction of said court, the surplus, if any, to be disposed of by proper order of such court. The said court is empowered to ascertain, as far as practicable, the names and addresses of all Florida creditors and the amounts due and owing to them under bonds given by said surety company, and to notify the Florida creditors to make proof of their claims and to determine the validity and the amount due each of them. The claims of all Florida creditors of any such surety company not reduced to final judgment prior to the time the said Court of Chancery takes charge of such Florida assets shall participate in the proceeds of the sale of said securities and assets only on a proportional basis with other Florida creditors: Upon the said Court of Chancery assuming jurisdiction of the said securities and assets of such surety company, all actions against the said company and the said securities and assets shall be stayed, pending the further orders of said Court and the State Treasurer, and the State of Florida shall thereby be absolved from any further liability on account of said securities, and the right of said surety company to transact business in this State shall cease and determine.

SECTION 2. All laws and parts of laws in conflict with this Act are hereby repealed.

SECTION 3. This Act shall take effect upon becoming a law.

Approved May 10, 1933.

U. S. GOVERNMENT PRINTING OFFICE: 1933

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